

MINUTES  
**SENATE STATE AFFAIRS COMMITTEE**

**DATE:** Friday, January 13, 2017

**TIME:** 8:00 A.M.

**PLACE:** Room WW55

**MEMBERS PRESENT:** Chairman Siddoway, Vice Chairman Hagedorn, Senators Davis, Hill, Winder, Lodge, Lakey, Stennett, and Buckner-Webb

**ABSENT/ EXCUSED:** None

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CONVENED:** **Chairman Siddoway** called the meeting of the Senate State Affairs Committee (Committee) to order at 8:03 a.m. with a quorum present.

**INTRODUCTIONS:** **Chairman Siddoway** welcomed the Committee and those in attendance. He introduced Twyla Melton, Secretary of the Committee, and Kit Bush, Page. He invited Ms. Bush to share her background and what she hopes to learn from this experience.

**Ms. Bush** related that she was born in Pocatello but now lives in Boise and attends Boise High School. She explained that she has a history with the Idaho Legislature, being a sixth generation Idahoan whose grandfather served in the Idaho Legislature, both in the House and in the Senate. (attachment 1) **Ms. Bush** said she sought an assignment as a page because her father encouraged her to do so, and her brother also encouraged her as he had been a page. She stated that she has learned a lot and is enjoying the experience.

**CONTESTED ELECTION**

**Preliminary Meeting Regarding the Contested Election.**

**Chairman Siddoway** explained that the Committee will begin the procedure by receiving direction from Eric Milstead, Director, Legislative Services Office (LSO) and Brian Kane from the Attorney General's office.

**Brian Kane**, Assistant Chief Deputy, Idaho Office of Attorney General (AG), presented an overview of the procedure in statutes with regard to the election contest. (attachment 2) He emphasized that he has no opinions regarding the facts and the law as they are presented to the Committee, and that this is a decision wholly within the discretion of the Committee. **Mr. Kane** continued that he was giving the Committee the framework within which it will operate. He advised them to feel free to ask any questions as they come up or at the end of the presentation. He stated that in presenting the provisions of the law, he is giving an overview. He recommended the Committee take some time to go through the statutes and gain a greater understanding of what is there. The Committee will review this information at the next meeting.

**Mr. Kane** stated the following:

- An election contest was filed on November 28, 2016, along with the required bond, in the office of the Secretary of State.
- The President Pro Tem of the Senate issued a procedural order requiring that all evidence in the matter be submitted by December 29, 2016. This order is consistent with the requirements in Idaho Code § 34-2107.
- Briefs were asked for and submitted. The original briefs were submitted on January 4, 2017, with responses due on January 9. Those items were included in the members' folders.

The election contest is now set for a hearing before the Committee on January 16, 2017. Each side will have twenty minutes to present their side of the case; no additional testimony will be taken by the parties. It is at the discretion of the Committee to hear other testimony if they deem it necessary.

There is no examination or cross-examination by the parties of anyone the Committee asks to come before it. However, the Committee has full discretion to ask questions of both the parties before them and anyone called in front of the Committee.

The Committee will then vote and make a recommendation to the full Senate. There should be no ex parte communication, meaning one on one communication, regarding the election contest outside of the Committee hearing or outside of the full Senate with anyone involved in this election contest. Communication may be held concerning other matters, but not regarding the election contest.

The Senate has ultimate discretion in this matter. This process derives from the State Constitution and is an old part of the ability and right of parliaments and legislatures to sit and judge their own members. This reflects the significance of this action.

**Mr. Kane** cited the remedy options found in Idaho Code § 34-2121. The Committee will hear the contest and make a recommendation to the Senate. There are two general outcomes that may occur: First, the Committee can confirm the results of the election, which would be the recommendation to the Senate. The second alternative is to annul the results of the election, setting aside the election. If the Committee comes to that conclusion, there are two options: 1) the votes counted would have resulted in a tie, the Senate decides the outcome by lot, e.g. drawing a straw or flipping a coin; or 2) the Senate also has the authority, if the person elected is disqualified or should not be declared the winner, to declare the election void. In that event, the Senate can declare the office vacant and have it filled under the process in Idaho Code Chapter 9, Title 59; or the Senate can order a new election and the Senate would clarify what office it is, the time of the election, and the candidates to be placed on the ballot. He reiterated that through the statutes the Senate has a lot of discretion in this matter.

At the conclusion the Committee has the authority under Idaho Code § 34-2120 to assess costs against either the contestant or the contestee. If the election results are confirmed, costs can be assessed against the contestant; if the election is annulled, costs can be assessed against the incumbent. If the Senate decides to order a new election, there is a process in Idaho Code where the costs are apportioned to the State and the county. In that circumstance, witness fees and costs of discovery are provided for in the Idaho Code if it is silent with regard to attorney fees as part of the cost. The assessment of attorney's fees is at the Senate's discretion.

**Mr. Kane** continued by discussing definitions and burden of proof. He stated that it is important to have these definitions set out. The incumbent is the holder of the seat, the declared winner of the election (also known as the contestee). Sometimes the Idaho Code uses "incumbent" and sometimes it uses "contestee." It is important the Senate knows who the Idaho Code is talking about. In this instance, the contestee or incumbent would be Senator Nye. The contestant is the person challenging the result of the election. In this matter it will be Mr. Katsilometes.

Concerning the burden of proof, **Mr. Kane** explained that in this case the contestant bears the burden of proving that Senator Nye is either disqualified, or sufficient votes were either cast or counted that could have changed the result of the election. **Mr. Kane** provided the Committee with a case citation regarding this issue, Noble v. Ada County Elections Board, 135 Idaho 495, 501(2000).

The qualifications to be placed on the ballot were presented by **Mr. Kane**. He specified two places where ballot qualifications are explained, the Constitution in Article III, Section 6 and Idaho Code § § 35-614 and 614a. The qualifications are that the candidate must: 1) be 21 years of age; 2) be a citizen of the United States; 3) have resided in the district a year preceding the general election; 4) be an elector within the district; and 5) file a declaration and fee (\$30.00) with the Secretary of State. **Mr. Kane** pointed out the powers of each house as set forth in the Constitution, Article III, Section 9, explaining that each house when assembled shall be the judge of the election qualifications and returns of its members.

**Mr. Kane** stated that Idaho Code Chapter 21, Title 34, sets forth the procedure for a contest of election. In this matter three grounds have been advanced for the contest. The first ground claims that the incumbent has committed a violation as set out in Chapter 23, Title 18, Idaho Code, which identifies election offenses. Mr. Kane indicated that it is not necessary to read the entire chapter, but he recommended that the committee read the title page which lists the offenses that are set out in Idaho Code Chapter 23, Title 18. Perusing the list will give an understanding for the types of things that are meant to be included within that chapter. The second ground claims that illegal votes have been received or legal votes rejected at the polls in sufficient numbers to change the result. The third ground claims that the board of canvassers errored in counting votes or in declaring the result of the election if the error would have changed the result.

**Mr. Kane** explained Idaho Code Title 18, Chapter 23, which covers offenses not otherwise provided for. It states, "Every person who willfully violates any of the provisions of the laws of this state relating to elections is, unless a different punishment for such violation is prescribed by law, punishable by fine not exceeding \$1,000, or by imprisonment in the state prison not exceeding five (5) years, or by both." Under this offense the willful violation indicates a mental state element which increases the hurdle with regard to the burden of proof. The second clause **Mr. Kane** discussed was "unless a different punishment for such violation is prescribed by law." This is another consideration to contemplate regarding this case. The primary allegation under Idaho Code Title 18, Chapter 23 is a violation of Idaho's Sunshine Law which is Idaho Code Title 67, Chapter 66. He directed the Committee's attention to Idaho Code § 67-6625 which is the penalty provision within the Sunshine law. There are two remedies set forth, the civil fine and criminal fine which is a misdemeanor under that provision of code. He said one of things the Committee has to evaluate is whether the allegation advanced fits under Idaho Code § 18-2315 or whether it fits under Idaho Code § 67-6625 or even whether it fits under both.

**Mr. Kane** stated that, considering counting and canvassing errors, one of the requirements within the election contest is that if there is any allegation of misconduct by the election judges, meaning they counted wrong or they didn't do something right, that error has to be alleged in conjunction with a finding that, had that mistake not occurred, the vote would have been different. It has to be an error that would have resulted in a changed outcome of the election. He reiterated that the burden of proof in those circumstances is on the contestant.

**Mr. Kane** affirmed that the matter before the Committee was referred by the full Senate. He said he is available to answer questions as they arise. He again emphasized the recommendation that the Committee members go through the mentioned statutes. He announced that this same presentation will be repeated at the next meeting.

**Chairman Siddoway** thanked Mr. Kane and asked for questions from Committee.

**Senator Sennett** asked for clarification on the ex parte communication. She inquired if, without the presence of the contestant, that conversation amongst the members of our Committee is allowed. **Mr. Kane** responded that the ex parte communication is between the parties and the members of the Senate. The members of the Senate can discuss it among themselves. There should not be a situation where, for example, the contestant has a one-on-one conversation with a Senator. **Mr. Kane** recommended that, if that occurs, the Senator should tell the contestant that if they have this conversation they should include the incumbent.

**Eric Milstead**, Director, Legislative Services Office (LSO), distributed talking points (attachment 3) and an index (attachment 4), along with flash drives to the Committee members. **Mr. Milstead** explained that LSO has reduced all of the documents in the sealed box presented to the Senate on January 10 to electronic versions and has organized them in a way that will be helpful to the Committee. He referred to the index and said that it is identical to the index of documents that the Secretary of State provided. Information was added to aid organization. Two columns were added. All documents were numbered, so one of the columns indicates the numbers of the documents. The other column shows the name of the electronic folder where each document can be found. This will allow you to track more clearly and more quickly documents that need to be reviewed. **Mr. Milstead** emphasized that every document in the box is now on each flash drive.

**Mr. Milstead** guided the Committee through the contents of the flash drive and how to use the drive.

**Senator Hill** asked if the date received is the date that the recipient received it or the date the Secretary of State received it. **Mr. Milstead** replied that it is the date the Secretary of State received the document. He pointed out that everything on the index is information provided by the Secretary of State, except for the first two columns.

He directed the Committee's attention to the end of the index, documents 52 through 57. These reflect the memoranda or briefs that the parties have filed. **Mr. Milstead** indicated the five memoranda or briefs in the folder were not included in the sealed box that was delivered by the Secretary of State. These documents were filed after the date the box was sealed. They were delivered to the Senate by the Secretary of State in a separate folder. There are two briefs filed by the contestant's attorney

(Mr. Katsilometes' attorney, Mr. Kahle Becker), two briefs filed by the incumbent's attorney (Senator Nye's attorney, Mr. James Ruchti), and one brief from the contestant himself dealing with counts two and three referenced in the Notice of Contest of Election. The other four briefs by each attorney are the arguments posed by each side and a rebuttal to those arguments. He reiterated that those are in a separate folder at the end of the index.

**Mr. Milstead** directed the Committee's attention to the depositions folder, documents 31 through 38. As LSO included every document that was in the box, Committee members will have two copies of the depositions: those submitted and filed by the contestant, and the same copies that were filed by the incumbent. They are in different format but the Committee may choose the format it prefers. It was an unavoidable duplication.

**Mr. Milstead** referenced an original deposition, item 48. Only the first page is included as it is a duplicate and would provide three copies of the same document. The original is included in the box, and is available for review in the State Affairs Committee office.

**Vice Chairman Hagedorn** inquired if item 48, the deposition, is the first page of the other exhibits of depositions that are already within this folder, so nothing is missing from that particular deposition. **Mr. Milstead** replied that Senator Hagedorn was correct. He also confirmed that the members could review the original.

**Mr. Milstead** explained that there are two types of affidavits. The first is process oriented, attesting to service of papers or notification of parties. Because they are not substantive they are organized into a subfolder. The others in the principle folder are lengthier and include exhibits to consider as evidence in the Committee's deliberations. **Mr. Milstead** pointed to the Ruchti exhibit affidavit plus Exhibits A through E. In these exhibits there is some redacted material stemming from an expedited hearing held telephonically on January 12, 2017, with the parties, the Pro Tem, the Majority Leader, and Senator Siddoway. It was based on a motion that was filed. The result was that some of this affidavit was deemed irrelevant. As a result, the redacted paragraph and the associated exhibit were stricken.

**Mr. Milstead** explained that any orders that have been filed, including the procedural orders Brian Kane referenced, are found in the Affidavits folder. The first one, document number 12, has specifics about how the process has proceeded to this date. He stated that it also has specifics that will govern the hearing on Monday. He recommended the Committee review that order.

**Mr. Milstead** explained that because every document that was filed was included, there are some that are proposed orders. Documents 25 and 26 were proposed orders, filed by participants, that could have been adopted by the Pro Tem or Majority Leader but were not so are not pertinent. The last order, document 51, is the final order and is signed by the Pro Tem.

**Mr. Milstead** concluded by assuring the Committee that he would be available to answer any questions they may have as they navigate through this material.

**Chairman Siddoway** advised that the Committee needs to concentrate on the charges, determine the presence of the burden of proof, and determine if the remedies being requested are appropriate.

#### **PASSED THE GAVEL:**

Chairman Siddoway passed the gavel to Vice Chairman Hagedorn.

#### **Distribution of Rule Books**

**Vice Chairman Hagedorn** asked the Committee to look at the rules. He announced that the Committee will be hearing the rules next week.

**Senator Hill** asked if these were all of the rules. He stated that he did not see any from the lottery and racing commissions. He explained that there were some rules regarding instant horse racing to be repealed and they were not ready last year. He asked if they were in the proposed rules. **Vice Chairman Hagedorn** responded that they were not delivered and that he would find out where they are.

**PASSED THE  
GAVEL:**

Vice Chairman Hagedorn passed the gavel back to the Chairman.

**Chairman Siddoway** informed the Committee that they will be meeting jointly with the energy committee from the House to hear from the Idaho National Laboratory. It will be in the Lincoln Auditorium Monday afternoon from 1:30 to 3:00.

**ADJOURNED:**

There being no further business, **Chairman Siddoway** adjourned the meeting at 8:45 a.m.

---

Senator Siddoway  
Chair

---

Twyla Melton, Secretary

---

Carol Cornwall, Assistant Secretary